

No. 82-1768

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1982

COMMONWEALTH EDISON COMPANY,

Petitioner,

v.

CHARLES A. GETTO, individually and on behalf
of all persons similarly situated,

Respondents.

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioner Commonwealth Edison Company ("Edison") submits the following in reply to the erroneous and obfuscatory matter raised by Respondent in his Brief In Opposition to Edison's Petition For Writ of Certiorari.

The Brief In Opposition is premised on the misconceived and absolutely erroneous supposition that Edison's liability for a refund of alleged overcharges — the estimated \$8 million subject to the "turn-over" Order — is a *fait accompli* and that the "turn-over" Order is simply an inevitable effectuation of a class recovery pre-ordained by the two Illinois Supreme Court opinions in the cause Respondent filed against Illinois Bell Telephone Company: *Getto v. City of Chicago, et al.*, 77 Ill.2d 346 (1979) ("*Getto I*") and *Getto v. City of Chicago, et al.* 86

Ill.2d 39 (1981, (*"Getto II"*)). No Illinois Court has ever even suggested, however, that Edison is or will be liable to Respondent or the class he purports to represent for the vast bulk of the alleged overcharges. Quite to the contrary, the Illinois Supreme Court was emphatic in its *Getto II* opinion that while the method of calculating the Section 36(a) charge to customers of *Illinois Bell Telephone Company* was improper (so held in *Getto I*),¹ "[n]o determination has been made as to liability for overcharges", 86 Ill.2d 49, 55, and the question of the amount and scope of any retroactive recovery which may be available to the class certified in the Bell Action remains unsettled. 86 Ill.2d 39, 50. As these issues remain unresolved even in the Bell Action,² Respondent's assertion that the same issues are next-to-established in his favor in the present cause because of the *Getto I* and *Getto II* decisions is unsupportable.

¹ That the Illinois Supreme Court held improper the method utilized by Illinois Bell Telephone Company to compute the Section 36(a) additional charge to its customers — a *method* substantially similar to that utilized by Edison for the same purpose — does not mean liability was determined or, indeed, that *Edison's* customers were overcharged. Unlike the cases involving Illinois Bell Telephone Company, the taxes questioned here never have exceeded statutory limits. Edison's filing of revised schedules for its Section 36(a) charge following the *Getto I* decision is not, as suggested by Respondent (Brief In Opposition, p. 5), a confession of past overcharges. The revised schedules represent but one possible interpretation of the *Getto I* decision. Moreover, conformance of future charges to this possible interpretation of *Getto I* has no impact on the status of past Section 36(a) charges.

Respondent's assertion that the filing of these revised schedules by Edison took a prominent role in the state court chancellor's ruling on the "turn-over" Order is startling. That Respondent can divine the basis of the chancellor's ruling in the face of a record devoid of any indication of such a rationale is pure omniscience.

² Indeed, legislation has been recently passed by the Illinois Legislature which would preclude most, if not all, retroactive recovery of allegedly excessive municipal utility taxes.

This erroneous supposition of Edison's predetermined liability clouds Respondent's response to the blatant constitutional infirmities of the "turn-over" Order entered against Edison. First, Respondent fails to appreciate the two-prong nature of the due process prerequisite to a prejudgment deprivation of property established by this Court's prior decisions. Focusing only on the "likelihood of success on the merits", Respondent, feeling secure in his misconceived supposition, ignores the second and perhaps more important showing required by due process: that the prejudgment deprivation is necessary to protect the party seeking such extraordinary relief. *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). As set forth at pages 9-10 of Edison's Petition, no such showing of necessity was or could be made to justify the "turn-over" Order.³

Respondent's further attempt to reconcile the "turn-over" Order entered against Edison with due process guarantees by characterizing it as receivership *pendente lite* is equally unsupportable. Again focusing solely on the misperceived probability of success in obtaining a determination of liability against Edison for the full \$8 million estimated alleged overcharge, Respondent simply ignores the clear import of this Court's decisions that there be a need shown for any such drastic form of prejudgment deprivation of property. Indeed, even Illinois precedent recognizes that a receivership is a remedy that must "be exercised with utmost care and caution, and only where the court is satisfied there is imminent danger of loss if it is not exercised." *Steinwart v. Susman*, 94 Ill.App.2d 471, 476 (2nd Dist. 1968) (Emphasis added). Accord: *Bagdonas v. Liberty Land and Investment Co.*, 309 Ill. 103, 111 (1923). The authority cited by Respondent on this issue, Brief

³ Respondent notes in the Brief In Opposition (p. 4) that the "turn-over" Order was entered only after "several hearings on the issue of a preliminary injunction." Respondent does not suggest, nor could he, that these "hearings" were evidentiary in nature. They were limited solely to questions of law, not fact.

In Opposition, pp. 6-7, does not support the myopic invocation of the receivership *pendente lite* remedy as a justification for the "turn-over" Order.

Respondent's citation to *American Reinsurance Company v. MGIC Investment Corporation*, 73 Ill.App.3d 316 (1st Dist. 1979) is likewise inapposite. There, the Illinois Appellate Court upheld not a prejudgment attachment of a defendant's estimated liability to a plaintiff, but rather an order of the trial court allowing a motion *made by the defendant* for leave to deposit monies which were the subject of a dispute between the parties into a fund to be administered by a court-appointed trustee. The difference between the interpleader-like circumstance present in *MGIC Investment* and the situation presented by the "turn-over" Order entered against Edison is obvious.

Finally, Respondent's veiled suggestion that this Court lacks jurisdiction to hear the issues presented by Edison's Petition is wholly without support. That the "turn-over" Order entered by the Circuit Court of Cook County against Edison is interlocutory in nature does not defeat this Court's jurisdiction to entertain the writ of certiorari Edison requests in this case, nor does it mitigate against the granting of that writ. An order requiring Edison to "turn-over" approximately \$8,000,000 of its assets to a court-appointed trustee prior to judgment, and without bond, where there has been no prior showing of either Edison's actual or probable liability to Respondent or the class he purports to represent for that amount *or* the probable inability to collect any judgment ultimately rendered absent such a "turn-over" Order, clearly falls into that class of collateral "interlocutory" orders held "final" for purposes of determining this Court's jurisdiction under 28 U.S.C. §1257(3). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1979).

CONCLUSION

For the reasons stated in this Reply Brief, as well as those in the Petition for Writ of Certiorari, the writ of certiorari should be granted and the decision of the Appellate Court of Illinois, First Judicial District summarily reversed, or if not summarily reversed, this cause should be set down for oral argument.

Respectfully submitted:

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